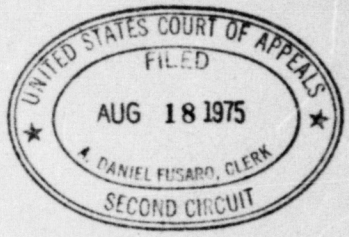
United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-2059



UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- -x

JOSEPH LUNZ, :

Plaintiff-Appellee, :

-against- : 75-2059

PETER PREISER, Commissioner of Department of Correctional Services, JEROME W. PATTERSON, Superintendent, Eastern New York Correctional Facility, :

Defendants-Appellants. :

- -x

B
P/S

BRIEF FOR PLAINTIFF-APPELLEE

Leslie Blau, Esq.
Attorney for Defendant-Appellee
120 Broadway
New York, New York 10005

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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JOSEPH LUNZ, :

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BRIEF FOR APPELLEE

This brief is submitted in support of Judge Wyatt's memorandum and order below, denying appellants in this civil rights action leave to set aside plaintiff's default judgment, granting plaintiff's request to be returned to a facility where he could obtain vocational plumbing training, and expunging from plaintiff's records the reason for his transfer, which was allegedly accomplished without notice or a hearing.

Questions Presented

1. Is this appeal moot?

2. Did the District Court abuse its discretion in refusing to set aside the default judgment?

Statement of Facts

This civil rights action was commenced by a complaint filed by appellee on January 13, 1975. The complaint alleged that after repeated requests, appellee (plaintiff) was transferred to Eastern Correctional Facility ("Eastern") in order to attend vocational plumbing school there; that around a month later, another inmate started a fight with plaintiff; and that about a week later, plaintiff was transferred from Eastern to Auburn Correctional Facility ("Auburn"), without notice or a hearing, in violation of his constitutional rights and in retaliation for being involved in a fight which he did not start. The complaint alleged that there was no plumbing school at Auburn, and sought plaintiff's return to Eastern and reinstatement in the plumbing school there. The complaint also requested that the reasons, if any, appearing on appellee's prison records for the transfer be expunged. The complaint sought no relief by way of money damages. It did not demand "such other and further relief as the Court may deem just" or make a similarly phrased general demand. The complaint did not make class action allegations and did not allege, in any way, that the conduct of which plaintiff complained was typical of that suffered by a class of prisoners generally or was likely to be repeated if plaintiff was granted his request for relief.

The summons, complaint and accompanying papers were served upon defendants on February 3 and 5, 1975. No answer was ever filed. On February 18, 1975, over a month after filing his complaint, plaintiff made application for entry of default, returnable February 24, 1975. The application was received by the Assistant Attorney General to whom the case was assigned on February 27, 1975. The Assistant took no action.

In a five-page, single-spaced opinion, filed on March 3, 1975, Judge Wyatt granted plaintiff's request. He noted that the action was for injunctive relief, and not for a "sum certain" (id., at 1). He also noted that "plaintiff's request for relief only demands a declaratory judgment that his transfer was illegal, and an injunction that he be returned to Eastern" (id., at 2)(emphasis in original) and that the relief requested was purely personal to the plaintiff.

Two days later, on March 5, the Assistant Attorney General, who "was about to request an extension of time to respond to the complaint" (Appellants' Br., at 3), learned of the default. On March 7, 1975, a motion was filed to set aside the default. On the return date, Judge Wyatt denied the motion without opinion.

On March 28, 1975, the Assistant Attorney General moved for a stay pending appeal. Paragraph 2 of the two-page

affidavit stated, in part:

> "2. Defendants request this stay because the transfer of plaintiff back to the Eastern New York Correctional Facility would moot the appeal."

No order granting a stay appears on the docket sheet, ~~or elsewhere in the Record on Appeal,~~ although Appellants' Brief (at 5) states that such an order was entered.* In any event, appellee was subsequently transferred to Clinton Correctional Facility, where a plumbing school exists, and, as of July 12, 1975, wrote that he was awaiting an interview with an instructor there.

I

THE APPEAL IS MOOT

By the Attorney General's own admission, the appeal has become moot as a result of appellee's transfer to an institution where he can pursue his goal of obtaining vocational plumbing training. The proposition is "indisputable" that "when a prisoner is transferred to a second prison at which the conditions of which he complained at the first no longer exist, his complaint is mooted." Rhem v. Malcolm, 389 F.Supp. 964, 968 (S.D.N.Y. 1975). Accord, Joyner v. Warden, Civ. No. 73-276-B (D. Md. June 18, 1975)(holding civil rights action seeking injunctive relief moot upon prisoner's transfer).

* Judge Wyatt, on April 11, 1975, endorsed the back of the motion papers with the words: "Motion Granted. So ordered."

Appellee's complaint, carefully limited as it was to seek specific relief only and not monetary damages, became mooted when the transfer he sought was obtained. In Rickey v. Wilkins, 335 F.2d 1, (2d Cir. 1964), this Court was presented with a civil rights action in which an Attica inmate, an adherent to the Muslim religion, was deprived of his right to worship. Though the inmate sought primarily injunctive relief, he sought "other and further relief", and in view of the alleged deprivations of First Amendment rights suffered, this Court, under the "special circumstances" presented, held that the appeal was not moot, stating:

> "It is beyond question that a plaintiff suing under the Civil Rights Act may seek money damages as well as injunctive relief, and a right to such damages of course cannot be conditioned upon the plaintiff's being, at the time he brings suit, in a situation where he is subject to further invasions of his rights. Although appellant, in a complaint which had all the earmarks of a pleading drawn up by one unfamiliar with the law, did not expressly ask for money damages, he did request 'redress to [sic] the above said religious persecution, and that plaintiff have such other and further relief as justice requires.' We think it just under the special circumstances of this case to construe this particular appellant's pleadings more liberally than we would normally construe pleadings of this sort and to rule that appellant's petition did contain a request for the money damages for which provision is made under the Civil Rights Act. Such

being the case, appellant was entitled to an adjudication of the allegations contained in his complaint notwithstanding his transfer to a different prison." 335 F.2d at 6.

The complaint in this action substantially differs from that in Richey. Plaintiff here does not allege special circumstances, such as deprivation of First Amendment rights. He does not seek money damages nor "other and further relief". Compare Rhodes v. Bureau of Prisons, 477 F.2d 347, 348 (5th Cir. 1973). And unlike cases in which class action allegations or allegations of conduct directed at a class are made (compare Vun Cannon v. Breed, No. 72-1715 [9th Cir. June 19, 1975]), this action abates when plaintiff is left with no personal stake in its outcome.

Moreover, in contradistinction to Richey, plaintiff does not allege -- and counsel does not contend -- that there is a likelihood that plaintiff will be returned to Auburn again without notice and a hearing. And in this the Attorney General concurs (Appellants' Br., at 7-8):

> "At the time plaintiff was transferred [some authorities] indicated that a a transfer, such as plaintiff's, was proper notwithstanding the fact that he had not been provided notice and a hearing . . .
>
> "The Supreme Court extensively considered the issue of the retroactivity of new procedural rules for correctional facilities in Wolff v. McDonnell, 418 U.S. 539 (1974) . . . ." (Citations omitted; emphasis added.)

Wolff v. McDonnell, of course, held that notice and a hearing are required in the case of certain disciplinary actions, and it is evident from the above that the Attorney General concedes that as to future punitive transfers, there must be notice and a hearing. In the absence, then, of any real likelihood of a recurrence of the conduct complained of, and in the absence of class action allegations or demands for monetary relief, this appeal is moot.

II

THERE WAS NO SHOWING OF INEXCUSABLE NEGLECT AND THERE WAS NO ABUSE OF DISCRETION BY THE DISTRICT COURT BELOW IN REFUSING TO SET ASIDE THE DEFAULT.

Fed. R. Civ. P. 60(b) states, in part:

"(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud;, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated,or it is no longer equitable that the judgment

should have prospective application; or (6) any other reason justifying relief from the operation of the judgment."

The Attorney General claims that the District Court abused its discretion by refusing to set aside the default, because the default was not "willful" or the product of "gross neglect". (Appellants' Br., at 5, 8.) In so claiming, the Attorney General seems to have fashioned a new standard, substituting "lack of gross neglect" for "excusable neglect." Such a standard, the Attorney General seems to be arguing, is justified "in light of defense counsel's heavy case load presented in an affidavit to the District Court (A. 168-68) and in light of the fact that unlike a private law firm the Attorney General cannot turn down a case and unlike the federal government the State is given twenty days to reply to a complaint rather than sixty." (Appellants' Br., at 6.)

The considerations which the Attorney General urges upon this Court are not denied by appellee; nor would they have been denied by the District Court. All that the Attorney General had to do was cite these same considerations in the form of an application for extension of time to answer. Having failed to do so, the Attorney General argues that the very considerations he could have cited in an application to extend time to answer suffice to blot out his cavalier disregard for the time limitations

within which all other defendants must answer. Surely this is not "excusable neglect."

The question of whether the high nature of the Attorney General's office justifies a special latitude on his part in responding to federal complaints appears never to have been considered before by this Court. The only case which counsel's research has disclosed bearing on the subject, however, does not support any such latitude.

In Dascenzo v. Balin, Civ. No. 73-2595 (E.D. Pa. 1974) (copy annexed as Appendix A),* plaintiff brought a civil rights action alleging that he was physically mistreated while confined in a state mental hospital. As in this case, the Assistant State Attorney General defaulted; and as in this case, he was in the process of preparing papers to file with the Court. Unlike this case, however, those papers consisted not of a routine request for extension of time after the fact, but a motion based upon the statute of limitations and seeking to dismiss for failure to state a cause of action. Also unlike this case, plaintiff sought money damages. In further contrast to this case, the Attorney General appeared in opposition to the motion

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* The opinion is not yet reported. The copy annexed hereto is a typed manuscript, copied from a computer printout of the opinion. The original printout is submitted with the original blue copy of this brief.

seeking a judgment of default, and therefore was only confronted with a standard of "good cause" under Fed. R. Civ. P. 55(c).

Withal, the motion for default was granted as to those parties against whom the complaint's allegations were held sufficient. The Court stated:

> "Defendant's brief in opposition to the motion for default judgment taken in conjunction with the affidavit offers absolutely no excusable reason for failure to enter an appearance or file an appropriate pleading within the time permitted by the rules of civil procedure. . . . There is nothing in the record to indicate that defense counsel sought either by informal agreement with counsel or formal court order any extension of time, or that defense counsel was in any way misled by plaintiff's counsel, or that there were any discussions between counsel about the case other than the notice of representation.
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> * * * * *
>
> "[The Attorney General's affidavit] indicates that the affiant received actual knowledge of the filing of the complaint . . . . Not until December 21, 1973 [after the twenty-day period] did defense counsel notify plaintiff's counsel of his intention to file a motion to dismis. . . . The affidavit also avers that the notice of intention to file the motion to dismiss 'was made as expeditiously as possible.' No other explanation for delay is asserted. Applying even the most liberal interpretation of what constitutes 'good cause,' the affidavit filed by defense counsel fails to set forth any recognizable 'good cause' to set aside the defaults.
>
> * * * * *

> "In this case there is no adequate explanation for the delay causing the default. Defendants' sole contention seems to be that no default judgment should be entered because there has been no 'clear record of delay or contumacious conduct' [citation omitted] and that the short delay has not prejudiced plaintiff. [Citation omitted.] Plaintiff, however is never required to establish that plaintiff will be prejudiced unless default judgment is entered." Id., at 3-4, 5-6 and 11.

Here, too, the Attorney General's lame explanation is that his papers were filed "as expeditiously as possible." But in this case, instead of a complex motion to dismiss, the papers consisted of a two-page affidavit in support of a motion to vacate a default in a case in which a five-page opinion had already been rendered. If there was no good cause in Pascenzo, far less is there excusable neglect here. If the Court in Pascenzo could in its discretion set down the case for inquest on unliquidated damages,* surely the Court below in this case could in its discretion order the transfer of this plaintiff to an institution where he could obtain the vocational training he had long sought.

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* After the case was set down for inquest, it developed that the complaint plaintiff had filed with the Court in Pascenzo was not identical with the complaint served upon defendants. Accordingly, the default was set aside after a hearing on May 15, 1974, on the grounds of mistake under Fed. R. Civ. P. 60(b). Civ. No. 73-2595 (Memorandum of October 15, 1974).

We respectfully submit that nothing in this Record supports the Attorney General's assertion that the Court below abused its discretion in refusing to set aside its judgment of default. Contrary to the Attorney General's implications, the Court below was not obligated to provide the Attorney General with an "explanantion" for denying of the motion or to "prepare a written decision". (Appellants' Br., at 9.) In this case, the Record itself is eloquent explanation.

CONCLUSION

The appeal should be dismissed as moot, or in the alternative, Judge Wyatt's exercise of discretion should be affirmed.

Dated: New York, New York
August 17, 1975

Respectfully submitted,

LESLIE A. BLAU
Attorney for Plaintiff-
Appellee
120 Broadway
New York, New York 10005

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYVANIA

- -x

FRED DASCENZO, :

Plaintiff, :

- against - : Civil Action No. 73-2595

DANIEL BALIN, M.D. formerly Superintendent of Philadelphia State Hospital, FRANKLYN CLARKE, formerly Mental Hospital Medical Director II for Philadelphia State Hospital, J.G. HAMANN, M.D. psychiatrist at Philadelphia State Hospital, JOHN HOLLAND, former psychiatric aide at Philadelphia State Hospital, WILLIAM LEE, SR., former psychiatric aide at Philadelphia State Hospital, CARLETON WHITNEY, former psychiatric aide at Philadelphia State Hospital, :

Defendants. :

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MEMORANDUM OPINION AND ORDER

Unexplained delay by the office of the Attorney General of Pennsylvania in appearing for defendants and filing pleadings to a civil rights complaint filed by a former patient and inmate of a state mental hospital compels a difficult decision as to whether a default judgment on the issue of liability should be entered against the defendants.

Plaintiff, seeking only damages for himself, alleges that he was physically mistreated in 1967 while a patient confined in a state mental hospital. Plaintiff was released and

APPENDIX A

discharged from the hospital in June of 1970 and filed this complaint on November 15, 1973 against various attendants and supervisory personnel of the hospital claiming a violation of his civil rights. No appearance or pleading having been filed, and more than twenty days having elapsed since service on all defendants, defaults were entered against the defendants by the Clerk on written request by plaintiff's counsel, the last such default occurring on December 21, 1973. The entries of defaults were properly recorded in accordance with Fed. R. Civ. P. 55(a). Because the claim is for unliquidated damages, plaintiff filed on December 21, 1973, a motion for entry of a default judgment against all defendants and a request for a jury trial limited solely to the issue of damages. Plaintiff's motion for judgment by default is founded on Fed. R. Civ. P. 55(b)(2).

On December 24, 1973, the Attorney General of Pennsylvania entered an appearance on behalf of all defendants. On December 26, 1973, the Attorney General of Pennsylvania filed a motion to dismiss based on the statute of limitations as to all defendants and "no cause of action" as to the supervising doctors. Also on December 26, 1973, defense filed a two and a half page brief opposing the motion for entry of a default judgment, with an attached affidavit. No application has been made by the defense to set aside the defaults entered by the Clerk. See Fed. R. Civ. P. 55(c).

The affidavit executed and filed by an Assistant State Attorney General avers that "on or about November 30, 1973, and prior to the Entry of Judgment by Default against the Defendants, he notified Plaintiff's counsel personally by telephone of his representation";[1] that defense counsel received actual notice of the filing of the complaint on November 26, 1973 and "was not made aware of service of the Complaint on all Defendants until the week of December 3, 1973"; that on December 21, 1973 defense counsel served upon plaintiff's counsel notice of intention to file a motion to dismiss on December 26, 1973 and that such notice "was made as expeditiously as possible and without actual notice of the filing of the Motion for Judgment by Default, or Request for Entry of Judgment by Default."

Defendant's brief in opposition to the motion for default judgment taken in conjunction with the affidavit offers absolutely no excusable reason for failure to enter an appearance or file an appropriate pleading within the time permitted by rules of civil procedure. Had an appearance been entered but no answer filed, the rules would have required three days' prior written notice of the application for a default judgment. Fed. R. Civ. P. 55(b)(2).[2] The most

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1 No default judgment has as yet been entered, and probably the affidavit in the quoted portion refers to the defaults entered by the Clerk.

2 Local Rule 36 requires 5 days' notice to opposing counsel prior to filing such a motion.

effect that can be given to the affidavit is that prior to the entry of any of the defaults, defense counsel notified plaintiff's counsel of his representation. There is nothing in the record to indicate that defense counsel sought either by informal agreement with counsel or formal court order any extension of time, or that defense counsel was in any way misled by plaintiff's counsel, or that there were any discussions between counsel about the case other than the notice of representation. Plaintiff's brief gives a somewhat different version of the "Notice of representation", but since no affidavit of these asserted facts has been filed, such assertions in the brief must be disregarded.

Fed. R. Civ. P. 55(a) provides:

> When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter his default.

The defaults entered by the Clerk were proper under the above rule. Defense counsel has filed no motion to set aside these defaults, as provided under Fed. R. Civ. P. 55(c). Because damages are unliquidated, the Clerk could not enter a judgment by default, and consequently a judgment by default may only be entered by the Court. Fed. R. Civ. P. 55(b)(2) provides that

> In all other cases the party entitled to a judgment by default shall apply to the

> court therefor. . . . If in order to enable the court to enter judgment or to carry it into effect, it is necessary . . . to determine the amount of damages . . . the court. . . shall accord a right of trial by jury to the parties when and as required by any statute of the United States.

It is clear therefore that the entry of the defaults by the Clerk does not, without more, constitute a default judgment. Plaintiff's counsel quite properly therefore filed the present motion for a default judgment and assessment of damages.

The defaults having been properly entered remain effective unless set aside "for good cause shown". Fed. R. Civ. P. 55(c). Although defendants have not moved to have the defaults set aside, the brief opposing entry of a default judgment by implication seeks such relief. The affidavit was executed personally by an Assistant State Attorney General. It indicates that affiant received actual knowledge of the filing of the complaint on or by November 26, 1973 and was aware by or during the week of December 3, 1973 that all defendants had been served. Not until December 21, 1973 did defense counsel notify plaintiff's counsel of his intention file a motion to dismiss. After so notifying plaintiff's counsel, the Assistant State Attorney General was first advised of the entry of defaults by defense counsel. Affiant avers, however, that prior to any default being entered he personally notified plaintiff's counsel of affiant's

representation of defendants. The affidavit also avers that the notice of intention to file the motion to dismiss "was made as expeditiously as possible." No other explanation for delay is asserted. Applying even the most liberal interpretation of what constitutes "good cause", the affidavit filed by defense counsel fails to set forth any recognizable "good cause" to set aside the defaults.

The record establishes that defense counsel orally advised plaintiff's counsel of his representation prior to any defaults being entered. Does this, in and of itself, without more, constitute "good cause" to set aside a default"? I find no case, nor has any been cited, to support such a contention. There is nothing to indicate any express or tacit understanding between counsel that an extension of time would be granted; there was no application to the court for any extension of time; there is absolutely no attempt to explain any cause for the delay. There is not even an assertion of a belief by defense counsel that no default would be entered without prior notice. The State Attorney General's Office had not entered any appearance nor filed any pleading until after plaintiff filed the motion for default judgment. No notice was, therefore, necessary; but, in any event notice has been received and opposition filed to the entry of a default judgment. Defense counsel has in no way been misled by the entry of a default judgment.

Defense counsel has in no way been misled by plaintiff's counsel so far as anything appears of record. The defaults entered of record against all defendants must, therefore, stand and they will not be set aside.

My conclusion is that although a court should have considerable discretion in determining whether to enter a default judgment, where defaults are entered by the Clerk pursuant to Fed. R. Civ. P. 55(a), for failure to plead to a complaint, to the extent that the facts pleaded establish a valid cause of action, default judgment as to that action should be granted upon proper application, unless there is "good cause" shown to set aside the defaults. Further, defendants should not be permitted to assert affirmative defenses subsequent to such a default, against absent "good cause" to set the default aside.

What is the effect of the entry of the defaults as determining the right to a default judgment? Under Fed. R. Civ. P. 55(b)(1), if a claim is for a sum certain, a default judgment may be entered by the Clerk "if he [defendant] has been defaulted for failure to appear and if he is not an infant or incompetent person." Because damages are unliquidated, a court order is required in this case pursuant to Fed. R. Civ. P. 55(b)(2). The defaults having been entered, does the court have any discretion as to the entry of a default judgment on the issues of liability? Whether the court

has any discretion to refuse such a default judgment in the absence of either "good cause" to set aside the defaults or a valid reason under Fed. R. Civ. P. 60(b) to set aside a default judgment, when and if entered, in uncertain.[3] It is certainly correct to declare null and void a default or default judgment for lack of personal or subject matter jurisdiction. Fed. R. Civ. P. 60(b)(4). Davis v. Carabo, 50 F.R.D. 468 (D. S.C. 1970); Carignan v. United States, 48 F.R.D. 323 (D. Mass. 1969); See Orange Theatre Corp. v. Rayherstz Amusement Corp., 139 F.2d 871 (3d Cir.), cert. denied, sub nom. Orange Theatre Corp. v. Brandt, 322 U.S. 740 (1944). In discussing default judgment when proper jurisdiction is present, Professor Moore stated:

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3 Once a default judgment is entered, an applicant for relief from such judgment must comply with Fed. R. Civ. P. 60(b); the standards for so doing probably being more restrictive than the "good cause" grounds to set aside a default. See Seanor v. Blair Transport Co. of Del., 54 F.R.D. 35 (E.D. Pa. 1971); Broder v. Charles Pfizer & Co., 54 F.R.D. 583 (S.D.N.Y. 1971 ; Titus v. Smith, 51 F.R.D. 224 (E.D. Pa. 1970).

6 J. Moore, Federal Practice 155.09 at 1824 (3d Ed. 1971). A Complaint should logically assert not only the requisite jurisdiction but also a proper cause of action. A default for failure to answer a complaint should at least conclusively establish all those facts that are properly pleaded. See Residential Reroofing Local 30-B v. Mezicco, 55 F.R.D. 516 (E.D. Pa. 1972). Thereafter, on application for a default judgment of the court, the court would appear to have the right and the duty to inquire as to whether those facts, so pleaded, establish jurisdiction and a valid cause of action. If a motion to dismiss can be granted for lack of jurisdiction after entry of a default or default judgment, a similar motion for failure to state a claim upon relief can be granted should likewise be considered.

> "The general rule is that a default judgment, which is warranted by the complaint, binds the defendant to the same extent as if he had appeared in the suit and contested the allegations of the compliant. (Footnote omitted; emphasis added.)

Defendants contend via the motion to dismiss that no valid civil rights cause of action has been stated against defendants Blaine, Clarke and Hamann, all of whom are merely supervising personnel. They are not alleged to have participated actively in any of the alleged wrongs, but rather "had direct knowledge or should have had direct knowledge of the wrongs done plaintiff", and that they had a duty to prevent these wrongs, but failed and neglected to do so. No conspiracy to violate plaintiff's civil rights is alleged. These allegations appear to be insufficient to establish a valid civil rights action. Brown v. Sielaff, 474 F.2d 826 (3d Cir. 1973); Gittlemacher v. Prosse, 428 F.2d 1 (3d Cir. 1970); Buszka v. Johnson, 351 F. Supp. 771 (E.D. Pa. 1972); Pugliano v. Staziak, 231 F. Supp. 347 (W.D. Pa. 1964), aff'd, 345 F.2d 797 (3d Cir. 1965).

I need not rule on the motion to dismiss at this time. The allegations of the complaint do not, in my opinion, establish sufficient facts to justify entry of a default judgment against defendants Blaine, Clarke and Hamann and to that extent plaintiff's motion will be denied. However, defendants Blaine, Clarke and Hamann, by reason of the defaults

entered against them, will be precluded from controverting any of the factual allegations of the complaint.

Judgments by default are generally viewed with disfavor. Gomes v. Williams, 420 F.2d 1364 (10th Cir. 1970); Hutton v. Fisher, 359 F.2d 913 (3d Cir. 1966); Tozer v. Charles A. Krause Milling Co., 189 F.2d 242 (3d Cir. 1951). Where a default judgment has been entered, before it may be set aside, in general, the movant must establish a proper explanantion for his default, and a meritorious defense. Wokan v. Alladin International, Inc., 485 F.2d 1232 (3d Cir. 1973). Although a "meritorious defense" probably includes a valid affirmative defense such as state of limitations,[4] In this case there is no adequate explanation for the delay causing the default. Defendants' sole contention seems to be that no default judgment should be entered because there has been no "clear record of delay or contumacious conduct" (E.F. Hutton & Co. v. Moffatt, 460 F.2d 284 (5th Cir. 1972),

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4 See C. Wright and A. Miller, 10 Federal Practice and Procedure, 12697 (1973) at 342:

> "Generally, a federal court will grant a motion under under Rule 55(c) only after some showing is made that if relief is granted the outcome of the suit may be different than if the entry of default or the default judgment is allowed to stand."

Under such a test, a statute of limitations defense would be a "meritorious" defense.

and that the short delay has not prejudiced plaintiff. (H.F. Livermore Corp. v. Aktiengesellschaft Gebruder Loepfe, 432 F. 2d 689 (D.C. Cir. 1970)). Plaintiff, however, is never required to establish that plaintiff will be prejudiced unless default judgment is entered. Where default has occurred, plaintiff is entitled to such default unless there are countervailing equities against such default. I fail to find any in this case, even though it is entirely possible that, had defense counsel within proper time limitations and before the default was entered raised the affirmative defense of statute of limitations, such defense would ultimately have been successful.[5] Indeed, it would seem almost ironical to permit defendants to defend on the statute of limitations, where defendants seek to interpose such defense after the time limitations imposed by the Federal Rules of Civil Procedure.

I conclude, therefore, that as to the defendants Holland, Lee and Whitney, default judgment on the issue of liability shall be entered, and the case shall proceed to trial solely on the issue of damages. As to the defendants Blaine, Clarke and Hamann, the defaults shall conclusively

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5 The motion to dismiss on the grounds of statute of limitations is entirely premature because there are many factual situations where the statute of limitations may be tolled. Since plaintiff had no opportunity to reply, at most, the issue could be determined prior to trial only by a motion for summary judgment after all requisite facts were established of record.

preclude them from denying any of the factual allegations of the complaint or from raising the defense of statute of limitations. They may, however, raise the issue that this complaint fails to state a cause of action against them.

ORDER

AND NOW, this 19th day of March 1974, judgment is directed to be entered in favor of the plaintiff, Fred Dascenzo, and against the defendants John Holland, William Lee, Sr., and Carleton Whitney, on the issue of liability, and the case shall be tried by a jury only as to the issue of damages.

As to the defendants, Daniel Baline, M.D., Franklyn Clarke and J.G. Hamann, M.D., the motion for entry of a default judgment is DENIED, but said defendants are precluded from raising any defense on the issue of liability other than the defense that the complaints fails to state a cause of action against them.

BY THE COURT:

Donald W. Van Artsdale

LEVEL 1 - 3 OF 4 DOCUMENTS

FRED DASCENZO v. DANIEL BLAIN, M.D. FORMERLY SUPERINTENDENT OF PHILADELPHIA STATE HOSPITAL

FRANKLYN CLARKE, FORMERLY MENTAL HOSPITAL MEDICAL DIRECTOR II OF PHILADELPHIA STATE HOSPITAL

J.G. HAMANN, M.D. PSYCHIATRIST AT PHILADELPHIA STATE HOSPITAL

JOHN HOLLAND, FORMER PSYCHIATRIC AILE AT PHILADELPHIA STATE HOSPITAL

WILLIAM LEE, SR., FORMER PSYCHIATRIC AIDE AT PHILADELPHIA STATE HOSPITAL

CARLETON WHITNEY, FORMER PSYCHIATRIC AIDE AT PHILADELPHIA STATE HOSPITAL

CIVIL ACTION NO. 73-2595

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SLIP OPINION

MARCH 19, 1974 ORDER VACATED OCTOBER 15, 1974

SLIP OPINION

VANARTSDALEN

MEMORANDUM OPINION AND ORDER

VANARTSDALEN, J.

UNEXPLAINED DELAY BY THE OFFICE OF THE ATTORNEY GENERAL OF PENNSYLVANIA IN APPEARING FOR DEFENDANTS AND FILING PLEADINGS TO A CIVIL RIGHTS COMPLAINT FILED BY A FORMER PATIENT AND INMATE OF A STATE MENTAL HOSPITAL COMPELS A DIFFICULT DECISION AS TO WHETHER A DEFAULT JUDGMENT ON THE ISSUE OF LIABILITY SHOULD BE ENTERED AGAINST THE DEFENDANTS.

PLAINYIFF, SEEKING ONLY DAMAGES FOR HIMSELF ALLEGES THAT HE WAS PHYSICALLY MISTREATED IN 1967 WHILE A PATIENT CONFINED IN A STATE MENTAL HOSPITAL. PLAINTIFF WAS RELEASED AND DISCHARGED FROM THE HOSPITAL IN JUNE OF 1970 AND FILED THIS COMPLAINT ON NOVEMBER 15, 1973 AGAINST VARIOUS ATTENDANTS AND SUPERVISORY PERSONNEL OF THE HOSPITAL CLAIMING A VIOLATION OF HIS CIVIL RIGHTS. NO APPEARANCE OR PLEADING HAVING BEEN FILED, AND MORE THAN TWENTY DAYS HAVING ELAPSED SINCE SERVICE ON ALL DEFENDANTS, DEFAULTS WERE ENTERED AGAINST THE DEFENDANTS BY THE CLERK ON WRITTEN REQUEST BY PLAINTIFF'S COUNSEL, THE LAST SUCH DEFAULT OCCURRING ON DECEMBER 21, 1973. THE ENTRIES OF DEFAULTS WERE PROPERLY RECORDED IN ACCORDANCE WITH FED. R. CIV. P. 55(A). BECAUSE THE CLAIM IS FOR

UNLIQUIDATED DAMAGES, PLAINTIFF FILED ON DECEMBER 21, 1973, A MOTION FOR ENTRY OF A DEFAULT JUDGMENT AGAINST ALL DEFENDANTS AND A REQUEST FOR A JURY TRIAL LIMITED SOLELY TO THE ISSUE OF DAMAGES. PLAINTIFF'S MOTION FOR JUDGMENT BY DEFAULT IS FOUNDED ON FED. R. CIV. P. 55(B)(2).

ON DECEMBER 24, 1973, THE ATTORNEY GENERAL OF PENNSYLVANIA ENTERED AN APPEARANCE ON BEHALF OF ALL DEFENDANTS. ON DECEMBER 26, 1973, THE ATTORNEY GENERAL OF PENNSYLVANIA FILED A MOTION TO DISMISS BASED ON THE STATUTE OF LIMITATIONS AS TO ALL DEFENDANTS AND "NO CAUSE OF ACTION" AS TO THE SUPERVISING DOCTORS. ALSO ON DECEMBER 26, 1973, DEFENSE FILED A TWO AND A HALF PAGE BRIEF OPPOSING THE MOTION FOR ENTRY OF A DEFAULT JUDGMENT, WITH AN ATTACHED AFFIDAVIT. NO APPLICATION HAS BEEN MADE BY THE DEFENSE TO SET ASIDE THE DEFAULTS ENTERED BY THE CLERK. SEE FED. R. CIV. P. 55(C).

THE AFFIDAVIT EXECUTED AND FILED BY AN ASSISTANT STATE ATTORNEY GENERAL AVERS THAT "ON OR ABOUT NOVEMBER 30, 1973, AND PRIOR TO THE ENTRY OF JUDGMENT BY DEFAULT AGAINST THE DEFENDANTS, HE NOTIFIED PLAINTIFF'S COUNSEL PERSONALLY BY TELEPHONE OF HIS REPRESENTATION"; [1] THAT DEFENSE COUNSEL RECEIVED ACTUAL NOTICE OF THE FILING OF THE COMPLAINT ON NOVEMBER 26, 1973 AND "WAS NOT MADE AWARE OF SERVICE OF THE COMPLAINT ON ALL DEFENDANTS UNTIL THE WEEK OF DECEMBER 3, 1973"; THAT ON DECEMBER 21, 1973 DEFENSE COUNSEL SERVED UPON PLAINTIFF'S COUNSEL NOTICE OF INTENTION TO FILE A MOTION TO DISMISS ON DECEMBER 26, 1973 AND THAT SUCH

NOTICE "WAS MADE AS EXPEDITIOUSLY AS POSSIBLE AND WITHOUT ACTUAL NOTICE OF THE FILING OF THE MOTION FOR JUDGMENT BY DEFAULT, OR REQUEST FOR ENTRY OF JUDGMENT BY DEFAULT."

N1 NO DEFAULT JUDGMENT HAS AS YET BEEN ENTERED, AND PROBABLY THE AFFIDAVIT IN THE QUOTED PORTION REFERS TO THE DEFAULTS ENTERED BY THE CLERK.

DEFENDANT'S BRIEF IN OPPOSITION TO THE MOTION FOR DEFAULT JUDGMENT TAKEN IN CONJUNCTION WITH THE AFFIDAVIT OFFERS ABSOLUTELY NO EXCUSABLE REASON FOR FAILURE TO ENTER AN APPEARANCE OR FILE AN APPROPRIATE PLEADING WITHIN THE TIME PERMITTED BY RULES OF CIVIL PROCEDURE. HAD AN APPEARANCE BEEN ENTERED BUT NO ANSWER FILED, THE RULES WOULD HAVE REQUIRED THREE DAYS' PRIOR WRITTEN NOTICE OF THE APPLICATION FOR A DEFAULT JUDGMENT. FED. R. CIV. P. 55(B)(2). N2 THE MOST EFFECT THAT CAN BE GIVEN TO THE AFFIDAVIT IS THAT PRIOR TO THE ENTRY OF ANY OF THE DEFAULTS, DEFENSE COUNSEL NOTIFIED PLAINTIFF'S COUNSEL OF HIS REPRESENTATION. THERE IS NOTHING IN THE RECORD TO INDICATE THAT DEFENSE COUNSEL SOUGHT EITHER BY INFORMAL AGREEMENT WITH COUNSEL OR FORMAL COURT ORDER ANY EXTENSION OF TIME, OR THAT DEFENSE COUNSEL WAS IN ANY WAY MISLED BY PLAINTIFF'S COUNSEL, OR THAT THERE WERE ANY DISCUSSIONS BETWEEN COUNSEL ABOUT THE CASE OTHER THAN THE NOTICE OF REPRESENTATION. PLAINTIFF'S BRIEF GIVES A SOMEWHAT DIFFERENT VERSION OF THE "NOTICE OF REPRESENTATION", BUT SINCE NO AFFIDAVIT OF THESE ASSERTED FACTS HAS BEEN FILED, SUCH ASSERTIONS IN THE BRIEF MUST BE DISREGARDED.

N2 Local Rule 36 requires 5 days' notice to opposing counsel prior to filing such a motion.

Fed. R. Civ. P. 55(a) provides:

When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter his default.

The defaults entered by the Clerk were proper under the above rule. Defense counsel has filed no motion to set aside these defaults, as provided under Fed. R. Civ. P. 55(c). Because damages are unliquidated, the Clerk could not enter a judgment by default, and consequently a judgment by default may only be entered by the Court. Fed. R. Civ. P. 55(b)(2) provides that

In all other cases the party entitled to a judgment by default shall apply to the court therefor.... If, in order to enable the court to enter judgment or to carry it into effect, it is necessary... to determine the amount of damages... the court... shall accord a right of trial by jury to the parties when and as required by any statute of the United States.

It is clear therefore that the entry of the defaults by the Clerk does not, without more, constitute a default judgment. Plaintiff's counsel quite properly therefore filed the present motion for a default judgment and assessment of damages.

The defaults having been properly entered remain effective unless set aside "for good cause shown". Fed. R. Civ. P. 55(c). Although defendants have not moved to have the defaults set aside, the brief opposing entry of a default judgment by implication seeks such relief. The affidavit was executed personally by an Assistant Stat Attorney General. It indicates that affiant received actual knowledge of the filing of the complaint on or by November 26, 1973 and was aware by or during the week of December 3, 1973 that all defendants had been served. Not until December 21, 1973 did defense counsel notify plaintiff's counsel of intention to file a motion to dismiss. After so notifying plaintiff's counsel, the Assistant State Attorney General was first advised of the entry of defaults by defense counsel. Affiant avers, however, that prior to any default being entered he personally notified plaintiff's counsel of affiant's representation of defendants. The affidavit also avers that the notice of intention to file the motion to dismiss "was made as expeditiously as possible." No other explanation for delay is asserted. Applying even the most liberal interpretation of what constitutes "good cause", the affidavit filed by defense counsel fails to set forth any recognizable "good cause" to set aside the

DEFAULTS.

THE RECORD ESTABLISHES THAT DEFENSE COUNSEL ORALLY ADVISED PLAINTIFF'S COUNSEL OF HIS REPRESENTATION PRIOR TO ANY DEFAULTS BEING ENTERED. DOES THIS, IN AND OF ITSELF, WITHOUT MORE, CONSTITUTE "GOOD CAUSE" TO SET ASIDE A DEFAULT? I FIND NO CASE, NOR HAS ANY BEEN CITED, TO SUPPORT SUCH A CONTENTION. THERE IS NOTHING TO INDICATE ANY EXPRESS OR TACIT UNDERSTANDING BETWEEN COUNSEL THAT AN EXTENSION OF TIME WOULD BE GRANTED; THERE WAS NO APPLICATION TO THE COURT FOR ANY EXTENSION OF TIME; THERE IS ABSOLUTELY NO ATTEMPT TO EXPLAIN ANY CAUSE FOR THE DELAY. THERE IS NOT EVEN AN ASSERTION OF A BELIEF BY DEFENSE COUNSEL THAT NO DEFAULT WOULD BE ENTERED WITHOUT PRIOR NOTICE. THE STATE ATTORNEY GENERAL'S OFFICE HAD NOT ENTERED ANY APPEARANCE NOR FILED ANY PLEADING UNTIL AFTER PLAINTIFF FILED THE MOTION FOR DEFAULT JUDGMENT. NO NOTICE WAS, THEREFORE, NECESSARY; BUT, IN ANY EVENT NOTICE HAS BEEN RECEIVED AND OPPOSITION FILED TO THE ENTRY OF A DEFAULT JUDGMENT. DEFENSE COUNSEL HAS IN NO WAY BEEN MISLED BY PLAINTIFF'S COUNSEL SO FAR AS ANYTHING APPEARS OF RECORD. THE DEFAULTS ENTERED OF RECORD AGAINST ALL DEFENDANTS MUST, THEREFORE, STAND AND THEY WILL NOT BE SET ASIDE.

MY CONCLUSION IS THAT ALTHOUGH A COURT SHOULD HAVE CONSIDERABLE DISCRETION IN DETERMINING WHETHER TO ENTER A DEFAULT JUDGMENT, WHERE DEFAULTS ARE ENTERED BY THE CLERK PURSUANT TO FED. R. CIV. P. 55(A), FOR FAILURE TO PLEAD TO A

COMPLAINT, TO THE EXTENT THAT THE FACTS PLEADED ESTABLISH A VALID CAUSE OF ACTION, DEFAULT JUDGMENT AS TO THAT ACTION SHOULD BE GRANTED UPON PROPER APPLICATION, UNLESS THERE IS "GOOD CAUSE" SHOWN TO SET ASIDE THE DEFAULTS. FURTHER, DEFENDANTS SHOULD NOT BE PERMITTED TO ASSERT AFFIRMATIVE DEFENSES SUBSEQUENT TO SUCH A DEFAULT, AGAIN ABSENT "GOOD CAUSE" TO SET THE DEFAULT ASIDE.

WHAT IS THE EFFECT OF THE ENTRY OF THE DEFAULTS AS DETERMINING THE RIGHT TO A DEFAULT JUDGMENT? UNDER FED. R. CIV. P. 55(B)(1), IF A CLAIM IS FOR A SUM CERTAIN, A DEFAULT JUDGMENT MAY BE ENTERED BY THE CLERK "IF HE [DEFENDANT] HAS BEEN DEFAULTED FOR FAILURE TO APPEAR AND IF HE IS NOT AN INFANT OR INCOMPETENT PERSON." BECAUSE DAMAGES ARE UNLIQUIDATED, A COURT ORDER IS REQUIRED IN THIS CASE PURSUANT TO FED. R. CIV. P. 55(B)(2). THE DEFAULTS HAVING BEEN ENTERED, DOES THE COURT HAVE ANY DISCRETION AS TO THE ENTRY OF A DEFAULT JUDGMENT ON THE ISSUES OF LIABILITY? WHETHER THE COURT HAS ANY DISCRETION TO REFUSE SUCH A DEFAULT JUDGMENT IN THE ABSENCE OF EITHER "GOOD CAUSE" TO SET ASIDE THE DEFAULTS OR A VALID REASON UNDER FED. R. CIV. P. 60(B) TO SET ASIDE A DEFAULT JUDGMENT, WHEN AND IF ENTERED, IS UNCERTAIN. N3 IT IS CERTAINLY CORRECT TO DECLARE NULL AND VOID A DEFAULT OR DEFAULT JUDGMENT FOR LACK OF PERSONAL OR SUBJECT MATTER JURISDICTION. FED. R. CIV. P. 60(B)(4). DAVIS V. CARABO, 50 F.R.D. 468 (D. S.C. 1970); CARIGNAN V. UNITED STATES, 48 F.R.D. 323 (D. MASS. 1969); SEE ORANGE THEATRE CORP. V. RAYHERSTZ AMUSEMENT CORP., 139 F.2D 871 (3D CIR.), CERT.

DENIED, SUB NOM. ORANGE THEATRE CORP. V. BRANDT, 322 U.S. 740 (1944). IN DISCUSSING DEFAULT JUDGMENT WHEN PROPER JURISDICTION IS PRESENT, PROFESSOR MOORE STATED:

THE GENERAL RULE IS THAT A DEFAULT JUDGMENT, WHICH IS WARRANTED BY THE COMPLAINT, BINDS THE DEFENDANT TO THE SAME EXTENT AS IF HE HAD APPEARED IN THE SUIT AND CONTESTED THE ALLEGATIONS OF THE COMPLAINT. (FOOTNOTE OMITTED). (EMPHASIS ADDED).

N3 ONCE A DEFAULT JUDGMENT IS ENTERED, AN APPLICANT FOR RELIEF FROM SUCH JUDGMENT MUST COMPLY WITH FED. R. CIV. P. 60(B); THE STANDARDS FOR SO DOING PROBABLY BEING MORE RESTRICTIVE THAN THE "GOOD CAUSE" GROUNDS TO SET ASIDE A DEFAULT. SEE SEANOR V. BLAIR TRANSPORT CO. OF DEL., 54 F.R.D. 35 (E.D. PA. 1971); BRODER V. CHARLES PFIZER & CO., 54 F.R.D. 583 (S.D.N.Y. 1971); TITUS V. SMITH, 51 F.R.D. 224 (E.D. PA. 1970).

6 J. MOORE, FEDERAL PRACTICE ¦55.09 AT 1824 (3D ED. 1971). A COMPLAINT SHOULD LOGICALLY ASSERT NOT ONLY THE REQUISITE JURISDICTION BUT ALSO A PROPER CAUSE OF ACTION. A DEFAULT FOR FAILURE TO ANSWER A COMPLAINT SHOULD AT LEAST CONCLUSIVELY ESTABLISH ALL THOSE FACTS THAT ARE PROPERLY PLEADED. SEE RESIDENTIAL REROOFING LOCAL 30-B V. MEZICCO, 55 F.R.D. 516 (E.D. PA. 1972). THEREAFTER, ON APPLICATION FOR A DEFAULT JUDGMENT TO THE COURT, THE COURT WOULD APPEAR TO HAVE THE RIGHT

SLIP OPINION

AND THE DUTY TO INQUIRE AS TO WHETHER THOSE FACTS, SO PLEADED, ESTABLISH JURISDICTION AND A VALID CAUSE OF ACTION. IF A MOTION TO DISMISS CAN BE GRANTED FOR LACK OF JURISDICTION AFTER ENTRY OF A DEFAULT OR DEFAULT JUDGMENT, A SIMILAR MOTION FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED SHOULD LIKEWISE BE CONSIDERED.

DEFENDANTS CONTEND VIA THE MOTION TO DISMISS THAT NO VALID CIVIL RIGHTS CAUSE OF ACTION HAS BEEN STATED AGAINST DEFENDANTS BLAINE, CLARKE AND HAMANN, ALL OF WHOM ARE MERELY SUPERVISING PERSONNEL. THEY ARE NOT ALLEGED TO HAVE PARTICIPATED ACTIVELY IN ANY OF THE ALLEGED WRONGS BUT RATHER "HAD DIRECT KNOWLEDGE OR SHOULD HAVE HAD DIRECT KNOWLEDGE OF THE WRONGS DONE PLAINTIFF", AND THAT THEY HAD A DUTY TO PREVENT THESE WRONGS, BUT FAILED AND NEGLECTED TO DO SO. NO CONSPIRACY TO VIOLATE PLAINTIFF'S CIVIL RIGHTS IS ALLEGED. THESE ALLEGATIONS APPEAR TO BE INSUFFICIENT TO ESTABLISH A VALID CIVIL RIGHTS ACTION. BROWN V. SIELAFF, 474 F.2D 826 (3D CIR. 1973); GITTLEMACHER V. PROSSE, 428 F.2D 1 (3D CIR. 1970); BUSZKA V. JOHNSON, 351 F. SUPP. 771 (E.D. PA. 1972); PUGLIANO V. STAZIAK, 231 F. SUPP. 347 (W.D. PA. 1964), AFF'D 345 F.2D 797 (3D CIR. 1965).

I NEED NOT RULE ON THE MOTION TO DISMISS AT THIS TIME. THE ALLEGATIONS OF THE COMPLAINT DO NOT, IN MY OPINION, ESTABLISH SUFFICIENT FACTS TO JUSTIFY ENTRY OF A DEFAULT JUDGMENT AGAINST DEFENDANTS BLAINE, CLARKE AND HAMANN AND TO THAT EXTENT PLAINTIFF'S MOTION WILL BE DENIED. HOWEVER, DEFENDANTS BLAINE, CLARKE AND

HAMANN, BY REASON OF THE DEFAULTS ENTERED AGAINST THEM, WILL BE PRECLUDED FROM CONTROVERTING ANY OF THE FACTUAL ALLEGATIONS O. THE COMPLAINT.

JUDGMENTS BY DEFAULT ARE GE[illegible]ALLY V.EWED WITH DISFAVOR. GOMES V. WILLIAMS, 420 F.2D 1364 (10TH CIR. 1970); HUTTON V. FISHER, 353 F.2D 913 (3D CIR. 1966); TOZER V. CHARLES A. KRAUSE MILLING CO., 189 F.2D 242 (3D CIR. 1951). WHERE A DEFAULT JUDGMENT HAS BEEN ENTERED, BEFORE IT MAY BE SET ASIDE, IN GENERAL, THE MOVANT MUST ESTABLISH A PROPER EXPLANATION FOR HIS DEFAULT, AND A MERITORIOUS DEFENSE. WOKAN V. ALLADIN INTERNATIONAL, INC., 485 F.2D 1232 (3D CIR. 1973). ALTHOUGH A "MERITORIOUS DEFENSE" PROBABLY INCLUDES A VALID AFFIRMATIVE DEFENSE SUCH AS STATUTE OF LIMITATIONS, N4/ IN THIS CASE THERE IS NO ADEQUATE EXPLANATION FOR THE DELAY CAUSING THE DEFAULT. DEFENDANTS' SOLE CONTENTION SEEMS TO BE THAT NO DEFAULT JUDGMENT SHOULD BE ENTERED BECAUSE THERE HAS BEEN NO "CLEAR RECORD OF DELAY OR CONTUMACIOUS CONDUCT" (E.F. HUTTON & CO. V. MOFFATT, 460 F.2D 284 (5TH CIR. 1972), AND THAT THE SHORT DELAY HAS NOT PREJUDICED PLAINTIFF. (H.F. LIVERMORE CORP. V. AKTIENGESELLSCHAFT GEBRUDER LOEPFE, 432 F.2D 689 (D.C. CIR. 1970)). PLAINTIFF, HOWEVER, IS NEVER REQUIRED TO ESTABLISH THAT PLAINTIFF WILL BE PREJUDICED UNLESS DEFAULT JUDGMENT IS ENTERED. WHERE DEFAULT HAS OCCURRED, PLAINTIFF IS ENTITLED TO SUCH DEFAULT UNLESS THERE ARE COUNTERVAILING EQUITIES AGAINST SUCH DEFAULT. I FAIL TO FIND ANY IN THIS CASE, EVEN THOUGH IT IS ENTIRELY POSSIBLE THAT, HAD DEFENSE COUNSEL WITHIN PROPER TIME LIMITATIONS AND BEFORE THE DEFAULT WAS ENTERED RAISED THE AFFIRMATIVE DEFENSE OF STATUTE OF

LIMITATIONS, SUCH DEFENSE WOULD ULTIMATELY HAVE BEEN SUCCESSFUL. N5/ INDEED, IT WOULD SEEM ALMOST IRONICAL TO PERMIT DEFENDANTS TO DEFEND ON THE STATUTE OF LIMITATIONS, WHERE DEFENDANTS SEEK TO INTERPOSE SUCH DEFENSE AFTER THE TIME LIMITATIONS IMPOSED BY THE FEDERAL RULES OF CIVIL PROCEDURE.

N4 SEE C. WRIGHT AND A. MILLER, 10 FEDERAL PRACTICE AND PROCEDURE, §2697 (1973) AT 342:

GENERALLY, A FEDERAL COURT WILL GRANT A MOTION UNDER RULE 55(C) ONLY AFTER SOME SHOWING IS MADE THAT IF RELIEF IS GRANTED THE OUTCOME OF THE SUIT MAY BE DIFFERENT THAN IF THE ENTRY OF DEFAULT OR THE DEFAULT JUDGMENT IS ALLOWED TO STAND.

UNDER SUCH A TEST, A STATUTE OF LIMITATIONS DEFENSE WOULD BE A "MERITORIOUS" DEFENSE.

N5 THE MOTION TO DISMISS ON THE GROUNDS OF STATUTE OF LIMITATIONS IS ENTIRELY PREMATURE BECAUSE THERE ARE MANY FACTUAL SITUATIONS WHERE THE STATUTE OF LIMITATIONS MAY BE TOLLED. SINCE PLAINTIFF HAD NO OPPORTUNITY TO REPLY, AT MOST, THE ISSUE COULD BE DETERMINED PRIOR TO TRIAL ONLY BY A MOTION FOR SUMMARY JUDGMENT AFTER ALL REQUISITE FACTS WERE ESTABLISHED OF RECORD.

I CONCLUDE, THEREFORE, THAT AS TO THE DEFENDANTS HOLLAND, LEE AND WHITNEY, DEFAULT JUDGMENT ON THE ISSUE OF LIABILITY SHALL BE ENTERED, AND THE CASE SHALL PROCEED TO TRIAL SOLELY ON THE ISSUE OF DAMAGES. AS TO THE DEFENDANTS BLAINE, CLARKE AND HAMANN, THE DEFAULTS SHALL CONCLUSIVELY PRECLUDE THEM FROM DENYING ANY OF THE FACTUAL ALLEGATIONS OF THE COMPLAINT OR FROM RAISING THE DEFENSE OF STATUTE OF LIMITATIONS. THEY MAY, HOWEVER, RAISE THE ISSUE THAT THIS COMPLAINT FAILS TO STATE A CAUSE OF ACTION AGAINST THEM.

ORDER

AND NOW, THIS 19TH DAY OF MARCH 1974, JUDGMENT IS DIRECTED TO BE ENTERED IN FAVOR OF THE PLAINTIFF, FRED PASCENZO, AND AGAINST THE DEFENDANTS JOHN HOLLAND, WILLIAM LEE, SR., AND CARLETON WHITNEY, ON THE ISSUE OF LIABILITY, AND THE CASE SHALL BE TRIED BY A JURY ONLY AS TO THE ISSUE OF DAMAGES.

AS TO THE DEFENDANTS, DANIEL BLAINE, M.D., FRANKLYN CLARKE AND J. G. HAMANN, M.D., THE MOTION FOR ENTRY OF A DEFAULT JUDGMENT IS DENIED, BUT SAID DEFENDANTS ARE PRECLUDED FROM RAISING ANY DEFENSE ON THE ISSUE OF LIABILITY OTHER THAN THE DEFENSE THAT THE COMPLAINT FAILS TO STATE A CAUSE OF ACTION AGAINST THEM.

BY THE COURT:

DONALD W. VAN ARTSDALEN